

As attorney for
Bryan Long and Kim Long

In re:)	Case No.: 20-10381 CN 7
FIRST INTERSTATE CONTRACTORS,)	Chapter: 7
INC.)	MOTION FOR RELIEF FROM THE
)	AUTOMATIC STAY
Debtor.)	
)	DATE: October 7, 2020
)	TIME: 11 am
)	LOCATION: U.S. Bankruptcy Court
)	99 South E. Street
)	Santa Rosa, CA 95404
)	
)	HON. CHARLES NOVAK
)	
)	

Bryan Long and Kim Long (“Movant”) moves this Court for an Order terminating the Automatic Stay of 11 § U.S.C. § 362 as to Movant so that Movant may obtain or cause the recovery of the building permits on file with the City of Santa Rosa, CA that are currently in the name of Debtor and by doing such thereby resume construction of Movant’s residential home located at 1929 San Salvador Drive, Santa Rosa, CA (the “Property”). The Property was destroyed during recent North Bay fires, and while only approximately half-way completed, was scheduled to be fully completed on or about June 23, 2020. Movant seeks through this Motion to

1 avoid the irreparable harm, increased costs, and continued unnecessary delay in completing
2 construction of the Property.

3 This motion is based upon this Notice, documents on file with the Court, the declaration
4 of Bryan Long, and the following Points and Authorities.

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6 **MEMORANDUM OF POINTS AND AUTHORITIES**

7 **I. FACTUAL SUMMARY**

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9 1. Debtor and Movant entered into a Residential Construction Contract (the
10 “Contract”) on or about May 24, 2020. The Contract amount to be paid by Debtor to Movant was
11 in the amount of \$650,000. On or about the date of the instant case filing Debtor had paid to
12 Movant the amount of \$359,934.78 and, at the time of the case filing the work contracted for was
13 approximately 50% complete despite a Contract representation made by the Debtor that all work
14 would be substantially complete by June 23, 2020. Debtor has performed no work on the
15 Property after the case filing.
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17 2. Movant filed a Proof of Claim in this case for the amount of \$178, 016. 98 (Claim
18 # 7-1) and has since such time incurred additional costs to cure mechanic’s liens placed upon the
19 Property by subcontractors of the Debtor in the amount of \$10,578.81.
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21 3. Movant has attempted to resume work for the finishing of Property construction
22 but is unable to engage another building contractor while the permits for Property construction
23 remain in the name of the Debtor and, while efforts have been made to obtain a permit release
24 form the Chapter 7 Trustee and from Debtor’s counsel, has been unable to obtain such. Therefore
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1 Movant seeks relief to the extent necessary to allow for the recovery of the building permits
2 associated with the Contract and the Property which remain in the name of the Debtor.

3 4. The trustee in this case failed to assume the Contract within 60 days of the case
4 filing pursuant to 11 U.S.C. § 365(d), and ultimately obtained an order for the abandonment of
5 the Debtor's property on September 1, 2020 (Dkt. #25).

7 **II. RELEVANT LAW**

8 **A. EFFECT OF TRUSTEE FAILURE TO ASSUME CONTRACT**

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10 5. The Trustee, in failing to expressly assume an executory within the time required
11 the contract within the time required the contract is deemed rejected, 11 USC § 365(d)(1). The
12 rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such
13 contract or lease, 11 U.S.C. § 365(g). However, under California law, a breach of contract is not
14 tantamount to termination. "A breach does not terminate a contract as a matter of course, but is a
15 ground for termination at the option of the injured party. Thus a finding of termination is not one
16 which must be implied from a finding of a breach." Whitney Investment Company v. Westview
17 Development Company, (1969) 273 Cal.App.2d 594 (internal citations omitted.). Therefore
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19 Movant is required to take further action to obtain Property permits associated with the Contract.

20 **B. EFFECT OF TRUSTEE ABANDONMENT OF EXECUTORY** 21 **CONTRACT**

22 6. Because the Property at the time of the instant case filing was only approximately
23 50% completed and required both further payment by the Movant and further performance by the
24 Debtor, the Contract was "... so far unperformed that the failure of either party to complete
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performance would constitute a material breach excusing the performance of the other". In Re Frontier Properties, Inc. (9th Cir. 1992) 979 F.2d 1358. Executory contracts are property of the bankruptcy estate. In re Computer Communications, Inc. (9th Cir.1987) 824 F.2d 725, 730.

7. The Trustee, upon noticed motion obtained an order for the abandonment of Debtor's property, including within, the abandonment of any interest in the Contract and, "...Upon abandonment, the debtor's interest in the property is restored nunc pro tunc as of the filing of the bankruptcy petition..." Catalano v. C.I.R. (9th Cir. 2002) 279 F.3d 682. Because the Contract is now Property of the Debtor (along with its associated building permits), relief from the automatic stay may be required for Movant to obtain control over the building permits and resume construction. In Re Gasprom, Inc. (B.A.P. 9th Cir. 2013) 500 B.R. 598, 604.

C. MOTION MAY NOT BE REQUIRED

8. Despite the foregoing, while the automatic stay is broad in scope and exemptions should be read narrowly, Sternberg v. Johnston (9th Cir. 2009) 582 F.3d 1114, 1119, the automatic stay provisions should be construed no more expansively than is necessary to effectuate legislative purpose, In Re Chugach Forest Products, Inc. (9th Cir. 1994) 23 F.3d 241, 245.

9. Arguably, and because entities for the Debtor under 11 USC §§ 365(a)(5),(6) ,(7) may be applicable in relation to the Contract and the building permits, Movant seeks relief only to the extent that such may be required.

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1 **D. STANDING AND CAUSE**

2 10. Movant's claim in this case (7-1) is for unsecured debt. Generally speaking an
3 unsecured creditor lacks standing to bring a motion for relief from stay, particularly for a cause
4 of the lack of adequate protection (*see e.g. In re Garland Corp.* (Bankr. Mass. 1980) 6 B.R. 456,
5 3 C.B.C.2d 24). However, where, a creditor plausibly alleges facts that show an interest in the
6 property, a significant likelihood of injury to that interest from lifting the stay, the court may
7 consider the motion (*see In Re Lopez-Soto* (1st Cir. 1985) 764 F.2d 23 for discussion of these
8 and other factors when deciding the right to intervene). Here the Contract calls for the Debtor to
9 maintain insurance on the Property and (inherently) to be present on the Property overseeing its
10 progress and stability. Movant is informed and believes that Debtor has no insurance protection
11 for the Property and because Movant has not performed any work since the filing of this case, is
12 not present or overseeing the Property, and therefore Movant is without adequate protection.

13 11. Furthermore, because Movant alleges Debtor owes to Movant far more than
14 Debtor's profit expectancy, there can be no finding of equity in the Property and, as a Chapter 7
15 case the Property is not necessary for an effective reorganization. 11 USC §362(d)(2).

16 **III. CONCLUSION**

17 12. For the reasons set forth above Debtor is entitled to relief from the automatic stay
18 to the extent necessary for Debtor to cause and obtain those Property building permits associated
19 with the Contract on file with the City of Santa Rosa, CA Planning and Economic Development
20 Department and to cancel those permits associated with the Property and the Contract that are on
21 file with the same agency in the Debtor's name.

1 WHEREFORE, Movant prays for an order as follows:

- 2 (1) For an Order granting relief from the automatic stay to the extent such is required for
3 the purpose of;
4
5 (2) Movant's obtaining or cause to be obtained permits for the Property with the Santa
6 Rosa, CA Planning and Economic Development Department to be in the Movant's or
7 in the Movant's agent(s)' names;
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9 (3) Movant's cancellation or cause to be cancelled permits for the Property which are on
10 file with the Santa Rosa, CA Planning and Economic Development Department
11 which are in the Debtor's name;
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13 (4) For an Order waiving the 14-day stay provided by Bankruptcy Rule 4001(a)(3);
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15 (5) For such other relief this Court deems appropriate.
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17 Respectfully Submitted;

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19 Dated: 09/23/20

By: /s/ Allan Cory
Attorney for Movant